



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-91-1

You are presently an attorney in private practice. Your question concerns your status as a former state employee. Specifically, you wish to know whether you may now represent a couple pro bono in legal proceedings which will involve your former state agency. You were an attorney for the Department of Social Services (DSS) until 1986. Your duties included representing DSS in trials under Care and Protection Petitions, G.L. c. 119 and Adoption Petitions, G.L. c. 210. One case you handled for DSS between 1984 and 1986 was a Care and Protection Petition in the ABC County Juvenile Court concerning infant minor children. The children were placed in the DSS foster home of Jane Doe from 1981 through 1983 when the children were returned to their biological parents. In mid-1984, the children were placed by DSS in the foster home of XYZ. During this period, you participated as an attorney on DSS' litigation to place the children under that agency's Care and Protection. After your departure from DSS, DSS began a petition to terminate biological parents' rights (Chapter 210 proceedings) in the ABC County Probate Court. The court decree terminating the rights of the biological parents was entered around December, 1989. The children, in the meantime, had been living in the XYZ foster home. Due to allegations of sexual abuse, the children were removed from the XYZ home in early 1989 and were placed in a specialized foster home for one year. The children are now residing in their third DSS foster home placement since their removal from the XYZ home.

Jane Doe and her husband wish to adopt the minor children. Mrs. Doe has been advised by DSS that she and her husband would not be considered an adoptive resource for the children and, because they are not their current foster parents, they have no right to a DSS administrative hearing. You have researched the legal issues raised by Mrs. Doe and you believe that she and her husband have standing to file a guardianship and/or adoption petition for the children in the ABC County Probate Court. You state that the Doe's proposed legal action would not use the DSS record prior to December, 1989. Rather, your argument would be as follows: (1) the children are now 8 years old and are legally free for adoption; (2) DSS has no adoption plan in place as required by DSS regulations and the issue is what placement will best serve the children's interests; and (3) Mr. and Mrs. Doe should be considered as potential adoptive parents because of their specialized skills in dealing with special needs children. In particular, you note that Mrs. Doe has, over the years, had many dozens of foster children in her home. In addition to her own natural children, she has adopted some of the foster children. She has been accorded special recognition for her efforts as an outstanding foster parent. You state that Mr. and Mrs. Doe's guardianship and/or adoption action will not involve any prior legal action in which you participated as DSS counsel and all legal issues relating to the children's care and protection as well as the termination of parental rights were resolved as of December, 1989.

QUESTION:

You wish to know whether the conflict law, G.L. c. 268A, s.5(a), permit you now to represent Mr. and Mrs. Doe.

ANSWER:

Yes, subject to s.s.5 and 23, as discussed below.

DISCUSSION:**Section 5(a)**

As a former employee of DSS, you are considered a former state employee for the purposes of G.L. c. 268A, s.5. Since you terminated your state employment more than one year ago, you are subject only to s.5(a). Section 5(a) prohibits a former state employee from acting as an agent or attorney for, or receiving compensation directly or indirectly, from anyone other than the Commonwealth or a state agency, in connection with any particular matter^{1/} in which the state or state agency^{2/} is a party or has a direct and substantial interest and in which you participated^{3/} as a state employee. A particular matter includes "any judicial or other proceeding ... request for a ruling or other determination, contract, claim, controversy ... decision, determination, [or] finding ... " See, s.1(k). Thus, s.5(a) would permanently prohibit you from representing a private client in connection with a particular matter in which you participated as a DSS employee. The question is whether your proposed representation of Mr. and Mrs. Doe in the ABC County Probate Court is either the same particular matter or is in connection with a particular matter in which you participated as a DSS employee. Based upon the facts presented by you, we conclude that it is not.

The Commission has previously determined that a former state employee's proposed private activity which is closely connected to a matter in which he previously participated, is precluded under s.5(a). The Commission has considered whether a particular matter is the same matter by evaluating whether the matter involves the same parties, the same litigation, the same issues or the same controversy. See, EC-COI-80-108 (private representation of clients prohibited where underlying claims are integrally related to or identical to claims in which state employee participated); 81-28 (former state employee who participated in lawsuit on validity of a law was precluded from representing private party in a different judicial proceeding because it would involve same controversy as litigation in which he officially participated - same parties, same statute, and same legal challenge on the validity of a statute); 83-140 (former state employee who helped to establish a trust is prohibited from performing legal work for the trust where the state has a continuing interest in monitoring the trust); 84-31 (former state employee who officially reviewed initial application of private entity is prohibited from representing that entity in a resubmission of the application where it involves the same controversy as the first application); 87-34 (former state employee may not challenge policy or validity of draft regulations which he helped to promulgate); 89-7 (former state employee's participation in an environmental impact review process precludes his private representation of the applicant in latter stages of that process because it involves the same controversy).

On the other hand, s.5(a) does not apply to particular matters which are not in connection with particular matters in which a state employee previously participated. See, EC-COI-86-16 (under s.17, municipal attorney may act as an attorney for his municipal employer in one lawsuit and as an attorney on behalf of private parties because town's lawsuit and several other lawsuits were considered separate particular matters even when, for reasons of judicial economy, they were combined by a court clerk into one docket number which required one appellate brief); 86-23 (former state employee could represent clients in a private transaction

under the terms of an escrow agreement because his representation was not subject to state review or approval although he had previously negotiated the agreement); 88-11 (former state employee's proposed activities not in connection with matters in which he participated or which were under his official responsibility). See also, EC-COI-84-21 (a construction project with distinct phases is not considered one particular matter); 84-15; 84-14 (under s.18, a parallel to s.5, each property assessment by a town is generally considered a different particular matter although the same parcel involved).

We conclude, based on the information you have presented, that your current legal representation of Mr. and Mrs. Doe in a guardianship and/or adoption petition in the Probate Court is not precluded by s.5(a) as long as the litigation is not in connection with the DSS lawsuit in which you participated. This conclusion is premised on the fact that the Doe lawsuit: (i) is a new particular matter arising subsequent to your departure from DSS; and (ii) it involves different parties, different facts and a different controversy in a different court than the c. 119 Care and Protection litigation in which you participated from 1984 to 1986. EC-COI-86-16. We also conclude that, although the children are part of the current litigation as well as the past litigation, this in and of itself is not sufficient to deem the Doe's lawsuit "in connection with" the c. 119 Care and Protection proceeding in which you participated.^{4/}

DSS' primary mandate when a child comes into its care and custody is to provide substitute care so that the child may be reunited with the biological parents. See, G.L. c. 119, s.1. 110 CMR 1.02(4); 1.03. If unification is not possible, the responsibility of DSS changes and the agency must find a permanent new home for the child in a timely fashion. 110 CMR 1.03. According to the facts you present, you did not participate as a DSS attorney in the determination to place the children with Mrs. Doe between 1981 and 1983, or to return the children to their biological parents between 1983 and mid-1984. Your participation in the Care and Protection litigation between 1984 and 1986 was in furtherance of DSS' initial responsibility to transfer temporary custody to DSS to provide substitute care and to assist the family in reunification.

The legal issues in the present controversy differ significantly from the 1986 Care and Protection proceeding. In 1989, the c. 210 petition to dispense with the parents' consent with adoption was granted and the biological parents' parents rights were permanently terminated. When the petition was granted, DSS' primary responsibility became the development of an alternate permanent home. At issue in the proposed litigation is whether Mr. and Mrs. Doe should be considered as a potential adoptive resource for the children since DSS has no adoption plan in place for the children. This litigation does not involve the fitness of the biological parents or the return of the children to the biological parents. Moreover, you did not participate in the c. 210 petition or in any adoption plan for the children as a DSS attorney. Accordingly, the proposed litigation does not relate to any particular matter in which you previously participated.^{5/}

We note that we might reach a different conclusion if, for instance, you now wish to represent the children's biological parents in litigation challenging or modifying the c. 210 court decree. Such a lawsuit would be subject to s.5(a) if it raised issues concerning parental fitness issues which were the subject of the c. 119 proceeding in which you participated as a DSS employee.

You should also be aware that you remain subject to s.23(c). Section 23(c) prohibits a present or former state, county or municipal employee or officer from knowingly or with reason to know: (1) accepting employment or engaging in business or professional activity which will

require him to disclose confidential information which he gained from his official position or authority; (2) improperly disclosing material or data which is exempt from the definition of a public record^{6/} and which was acquired in the course of his official duties. Accordingly, you may not use information in the Doe's litigation which is confidential and was learned by you while you were employed at DSS. See, EC-COI-90-11.^{7/}

DATE AUTHORIZED: January 16, 1991

¹ "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, s.1(k).

² "State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, s.1(p).

³ "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, s.1(j).

⁴ We decline to construe the initial DSS determination concerning the children as a continuing particular matter. Such an analysis would be overbroad under the fact of this opinion. This conclusion may not, however, apply to all DSS proceedings. Where, for example, under the broad equity powers accorded the court, proceedings under c. 119 and c. 210 are combined, these standards may not apply.

⁵ While we express no view as to the wisdom of your proposed representation of Mr. and Mrs. Doe in this matter and notwithstanding your statements to the contrary, you should be aware that the prohibitions of s.5(a) may well be implicated should the Doe's case involve matters in the DSS record prior to 1989 and which are in connection with the Care and Protection action in which you participated as a state employee.

⁶ M.G.L. c. 4, s.7.

⁷ This opinion is limited to an interpretation of G.L. c. 268A to your facts. You are advised to consult with the Board of Bar Overseers or Massachusetts Bar Association regarding the application of the Code of Professional Responsibility to your circumstances. We also note that a motion to disqualify you as counsel because of a conflict of interest can and may be raised in court by DSS upon examination of the facts in a judicial proceeding.